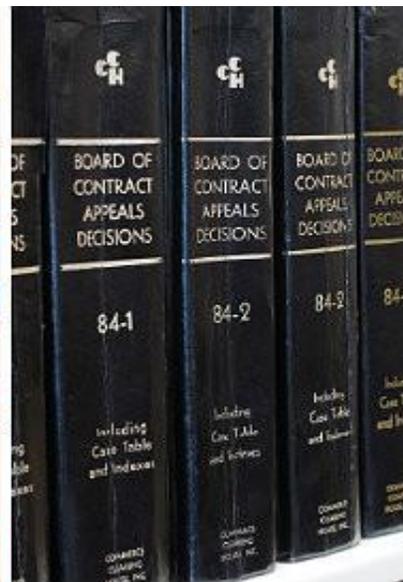


# ANNUAL REPORT

## UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS



Fiscal Year 2017

October 1, 2016 – September 30, 2017

## MESSAGE FROM THE CHAIR

In 2006, an Act of Congress dissolved most of the civilian agency boards of contract appeals and established the Civilian Board of Contract Appeals (CBCA). This Act brought judges, staff, and equipment from the former boards to the new CBCA. Previous concerns about the change quickly disappeared, as the judges began to see the benefits of a larger board, with more resources, more collegiality, and a greater variety of cases. Over the past ten years, the CBCA has docketed over six thousand cases and resolved over fifty-five hundred disputes through litigation or various forms of alternative dispute resolution (ADR). The CBCA has proven to be an unqualified success.

How far we have come. We began with eighteen judges from the prior boards. After ten retirements, one premature loss (we still miss Judge Eileen Fennessy's spark), and seven appointments to the CBCA, we currently have fourteen judges. Judge Stephen M. Daniels, the first Chairman of the CBCA and the former Chairman of the General Services Board of Contract Appeals, oversaw the transition and the development of the CBCA. Although Judge Daniels retired from the Board on September 30, 2017, after a 30-year judicial career, his legacy lives on.

In these ten years the Board has been transformed. For the first time, both the Chair and Vice Chair of the CBCA are women, as are half of our judges. The Board has successfully moved from paper filing (and faxing!) to e-filing. The Board's internal case management system permits the judges to see their case files electronically, enhancing access while traveling. We are currently revising the Board's rules to simplify and streamline them, to address the preference for electronic filing, and to align our rules more closely with the Federal Rules of Civil Procedure.

Our mission is to provide a more efficient, less expensive alternative to traditional federal litigation. To that end, we use technology and our space creatively, resulting in decreased burden and expense to the litigants. Our three courtrooms contain state-of-the-art audio-visual and teleconferencing technology. Our six conference rooms are configured to provide optimal space for ADR and also have the same audio-video and teleconferencing capabilities. Our judges also travel, conducting hearings and facilitating ADR all over the world. These many options enhance our ability to quickly and fairly resolve cases.

We are also dedicated to giving back to the government contracting community. We train future government contracts lawyers through a robust clerking program. So far, more than sixty student and post-graduate law clerks have completed our program. All of our post-graduate law clerks have joined the public sector or private law firms in government contracts positions. Our outreach to the government contracts community is further evident by our participation in bar association activities, as speakers on panels and at conferences, and as teachers of government contract courses at local law schools.

Our focus on our mission ensures that we will continue to timely resolve cases and to fairly administer justice for all who come before us. I am proud to lead the members of the CBCA, and look forward to the challenges the future may bring.

Judge Jeri K. Somers, Chair

## AUTHORITIES & JURISDICTION

The Civilian Board of Contract Appeals (CBCA) is an independent tribunal housed within the General Services Administration. The CBCA primarily resolves contract disputes between government contractors and agencies under the Contract Disputes Act (CDA). The CBCA also exercises jurisdiction in multiple areas based upon statute, delegations of authority, and memoranda of understanding (MOU) with other entities. These include:



- **CDA APPEALS:** Disputes between government contractors and civilian executive agencies under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109
- **ISDA CASES:** Cases arising under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450j-1(f), 450m-1(d)
- **FCIC CASES:** Disputes between insurance companies and the Department of Agriculture's Risk Management Agency involving actions of the Federal Crop Insurance Corporation (FCIC) under 7 U.S.C. §§ 1501 et seq.
- **TRAVEL & RELOCATION CASES:** Claims by federal employees under 31 U.S.C. § 3702(a)(3) for reimbursement of expenses incurred while on official travel or in connection with relocation to a new duty station
- **RATE CASES:** Claims by carriers or freight forwarders under 31 U.S.C. § 3726(i)(1) for review of actions of the General Services Administration regarding payment for transportation services
- **EAJA CASES:** Applications by prevailing private parties for recovery of litigation and other costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504
- **FMCSA CASES:** Binding arbitrations under a MOU with the Department of Transportation and procedures published at 77 Fed. Reg. 24,249-54 (June 11, 2012) of penalties assessed by the Federal Motor Carrier Safety Administration (FMCSA) against motor carriers for regulatory violations
- **FEMA CASES:** Binding arbitrations under section 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, and section 565 of the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, of disputes between applicants and the Federal Emergency Management Agency (FEMA) over funding for public assistance grants to address damage caused by Hurricanes Katrina, Rita, and Gustav
- **ADR UNDER MOU:** ADR services by agreement with the Department of Energy National Laboratories, Smithsonian Institution, and Millennium Challenge Corporation

## ALTERNATIVE DISPUTE RESOLUTION

In keeping with Congress' charge to the CBCA upon its creation, the Board encourages the prompt, efficient, and inexpensive resolution of disputes through ADR. The CBCA provides ADR services to executive agencies and other entities on matters arising under the CDA, as well as for disputes not covered by the CDA. ADR procedures include mediation, arbitration, early neutral evaluation, fact finding, mini trial, and summary trial with binding decision. The choice of procedure is entrusted to the parties to the dispute, who are encouraged to find the best ADR approach for their situation.

The CBCA has recently reconfigured six conference rooms and upgraded the audio-visual and teleconferencing capabilities in those rooms. This allows the CBCA to conduct multiple, simultaneous ADR proceedings with parties anywhere in the world. We expect this enhanced capability will save both private parties and the Government substantial time and money.

During the fiscal year, parties requested ADR in 60 cases. The Board, through ADR, fully resolved 47 cases primarily through mediation. See Page 10 for more detailed statistics.



“Our newly configured space facilitates the use of ADR in multiple cases at the same time.”

– Judge Jeri Somers, Chair



## DECISIONS OF NOTE

### *AHTNA ENVIRONMENTAL, INC. v. DEPARTMENT OF TRANSPORTATION*, CBCA 5456 (December 22, 2016)

The Federal Highway Administration awarded a firm-fixed-price contract to Ahtna Environmental, Inc. (AEI). The contract required the agency to send AEI a final voucher for payment, along with a draft release of claims for AEI to execute and return within ninety days. The contract stated that AEI's failure to return the documents would release all claims against the Government under the contract. After contract performance, AEI submitted a request for equitable adjustment (REA), and the agency sent AEI the final voucher and release. AEI advised the agency that it would not sign the release due to its pending REA, which AEI later resubmitted as a claim, despite advice from the agency that a claim was untimely. When the agency denied relief on the ground that AEI failed to reserve its contract claim, AEI appealed. The CBCA held, among other things, that AEI's response to receipt of the final voucher was sufficient notice to avoid a waiver of AEI's claim.

### *CH2M◆WG IDAHO, LLC v. DEPARTMENT OF ENERGY*, CBCA 3876 (September 7, 2017)

CH2M◆WG IDAHO, LLC (CWI) appealed the denial of a claim for \$41 million under a Department of Energy (DOE) contract to clean up nuclear fuel sites in and around Idaho. The contract was primarily cost-plus-incentive-fee (CPIF) but allowed the parties to add work on a cost-plus-fixed-fee (CPFF) basis. Early in performance, CWI reallocated some general and administrative costs from its base CPIF work to the CPFF portion of the contract, by agreement with DOE. The reduction of costs allocable to the CPIF work allowed CWI to earn higher incentive fees, for meeting cost targets, than the parties had anticipated. At the end of contract performance, DOE unilaterally invoked the contract's Changes clause to modify the payment terms and reduce CWI's incentive fees by \$27.3 million. When the dispute reached the Board, the CBCA awarded CWI the disputed amount on the grounds that an agency may not unilaterally change a contract's payment terms.

### *CRANE & CO., INC. v. DEPARTMENT OF THE TREASURY*, CBCA 4965 (November 8, 2016)

In 2015, Crane & Co., Inc. (Crane) appealed the denial by a Bureau of Printing and Engraving contracting officer of Crane's claim alleging that the specifications in a contract to insert optical thread into currency paper were defective and impossible to perform. In 2016, Crane sought leave to amend its complaint before the CBCA to allege that the contract was ambiguous and constructively changed. The CBCA denied leave to amend. It concluded that Crane's new allegations involved different operative facts than its claim and, in addition, were barred by the Contract Disputes Act's six-year statute of limitations, as the alleged change occurred in 2007 and Crane began incurring the alleged damages at that time. The CBCA distinguished precedent of the United States Court of Appeals for the Federal Circuit holding that the statute of limitations does not begin to run until a contractor can claim a "sum certain" of damages.

## DECISIONS OF NOTE

***CONSULTIS OF SAN ANTONIO, INC. v. DEPARTMENT OF VETERANS AFFAIRS***, CBCA 5458 (March 31, 2017)

The Department of Veterans Affairs (VA) placed a task order with Consultis of San Antonio, Inc. (Consultis) for information technology services under a General Services Administration (GSA) schedule contract. When a dispute arose as to the applicability of the Service Contract Act to the task order, Consultis submitted a claim for a price adjustment to the VA contracting officer, who denied it. The Board dismissed Consultis's appeal from the denial for lack of jurisdiction, holding that precedent of the United States Court of Appeals for the Federal Circuit required Consultis to submit its claim to the GSA schedule contracting officer, as the claim required interpretation of the schedule contract.

***ENGILITY CORP. v. AGENCY FOR INTERNATIONAL DEVELOPMENT***, CBCA 5444 (June 20, 2017)

After International Resources Group, Ltd. (IRG) appealed to the CBCA from a denial of its claim by a contracting officer of the United States Agency for International Development (USAID), USAID consented to a novation of the underlying contract to Engility Corporation (Engility). Engility and USAID then jointly asked the Board to substitute Engility for IRG in the appeal, and to dismiss the appeal with prejudice, as settled. Although the CBCA's rules of procedure do not address motions to substitute a party, the CBCA applied Board Rules 1(c) and (d), which allow the Board to consider the Federal Rules of Civil Procedure to resolve issues not covered by the Board's rules, and granted the motion to substitute Engility as a successor in interest to IRG under the standard of Rule 25(c) of the Federal Rules. The Board then dismissed the appeal with prejudice.

***SAVANNAH RIVER NUCLEAR SOLUTIONS, LLC v. DEPARTMENT OF ENERGY***, CBCA 5287 (May 12, 2017)

Savannah River Nuclear Solutions, LLC (Savannah River) operates a nuclear site under contract with the Department of Energy (DOE). In early 2016, the Department of Justice advised Savannah River that the Government intended to sue it under the False Claims Act in connection with billings under the contract. Three weeks later, Savannah River submitted a certified claim under the contract to DOE. The DOE contracting officer advised Savannah River that a regulation barring the settlement, compromise, payment, or adjustment of a claim "involving fraud" deprived him of "authority to take action on the claim." Savannah River appealed to the CBCA from a "deemed denial" of its claim. The CBCA granted DOE's motion to dismiss the appeal for lack of jurisdiction, holding that no deemed denial occurred, as a contracting officer who suspects fraud lacks authority to decide a claim.

## DECISIONS OF NOTE

***SUFFOLK CONSTRUCTION CO., INC. v. GENERAL SERVICES ADMINISTRATION***, CBCA 2953, et al. (April 20, 2017)

After a hearing at the CBCA was adjourned for the weekend, the contractor's attorney reentered the courtroom and removed a set of drawings from agency counsel's table without permission. The attorney then had the drawings copied by a vendor and returned to the agency late the following day. The full CBCA issued the attorney a public reprimand, finding that his actions impeded the administration of justice and violated the reasonable expectation that documents are secure on CBCA premises. The full Board denied the agency's motion to exclude the attorney or his law firm from the case, as the Board found no substantial prejudice to the Government from the removal and copying.

***TRANBEN, LTD. v. DEPARTMENT OF TRANSPORTATION***, CBCA 5448 (January 26, 2017)

TranBen, Ltd. (TranBen) alleged in a certified claim and in a later appeal to the CBCA that the Department of Transportation (DOT) breached the implied covenant of good faith and fair dealing under an indefinite delivery/indefinite quantity contract for paper transit subsidy vouchers, or constructively changed the contract, by misrepresenting the "availability" of paper vouchers to the Internal Revenue Service (IRS), in order to obtain IRS approval for DOT to distribute the tax-free subsidies to federal employees using smart cards instead of vouchers. TranBen sought \$14 million in lost profit under the voucher contract. The CBCA granted DOT's motion to dismiss the appeal for failure to state a claim. The Board concluded that even if the facts TranBen alleged were true, DOT did not change the contract or breach a duty to TranBen that was created or implied by the contract's terms.

***TURNER CONSTRUCTION CO. v. SMITHSONIAN INSTITUTION***, CBCA 2862, et al. (April 14, 2017)

Turner Construction Co. (Turner) renovated the American History Museum, on the National Mall in Washington, D.C., but Turner and the Smithsonian Institution (Smithsonian) never agreed to a fixed price for most of the work. Turner submitted claims on behalf of itself and numerous subcontractors, while the Smithsonian asserted a claim that it had overpaid Turner by \$24.5 million. Although the contract was not subject to the Contract Disputes Act, the CBCA heard appeals from the contracting officer's decisions pursuant to an agreement with the Smithsonian. The CBCA awarded Turner \$3.2 million in direct performance costs of unpriced work, including supervision services and installation of a steam generator, on the legal theory of quantum meruit ("what it has earned"), and another \$2.8 million for various subcontractor claims, including delay and disruption. The Board denied the Smithsonian's overpayment claim in its entirety as factually and legally unsupported.

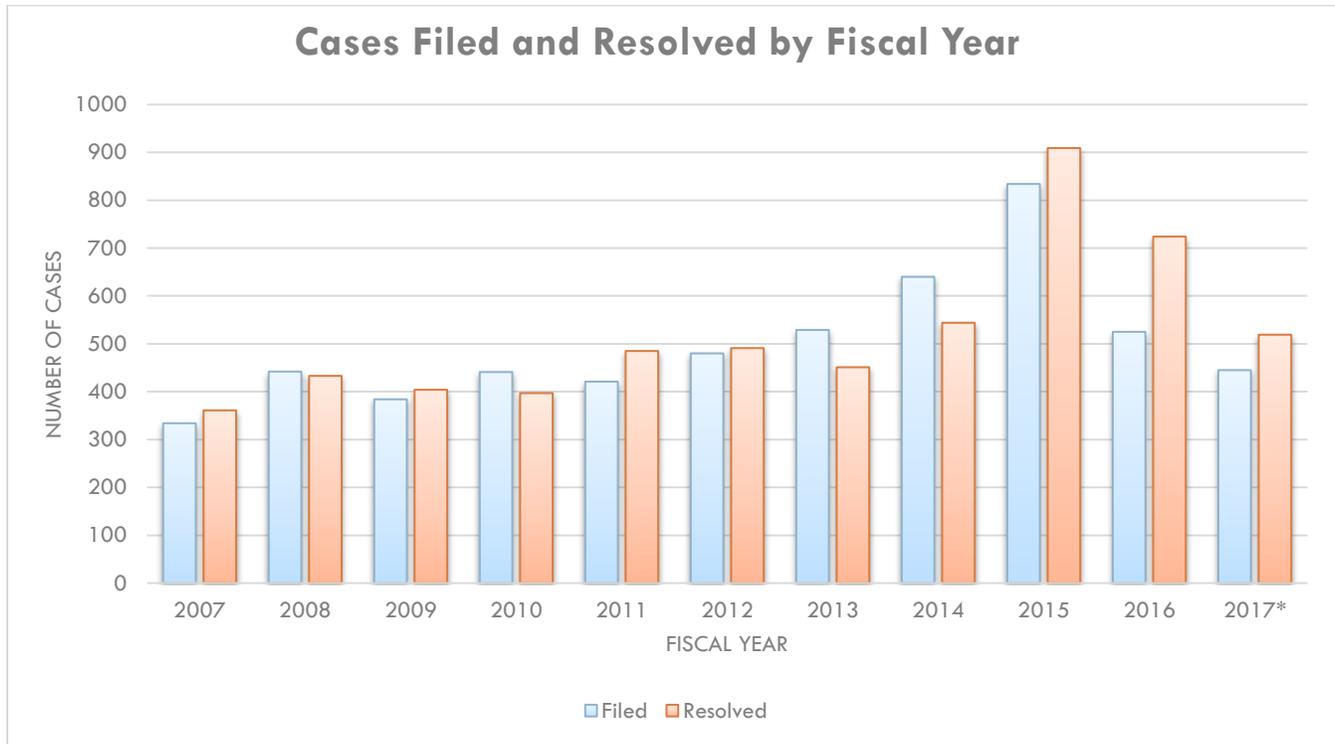
## DECISIONS OF NOTE

*YATES-DESBUILD JOINT VENTURE v. DEPARTMENT OF STATE*, CBCA 3350, et al. (September 19, 2017)

During the construction of a nine-building consulate complex for the Department of State in Mumbai, India, the Indian Government caused permitting delays. The Indian Government had warned the State Department before award that it might delay the Mumbai project to gain leverage in an unrelated tax dispute in the United States, but the State Department did not apprise the contractor of this possibility. The contractor, Yates-Desbuild Joint Venture (YDJV), completed the complex three years behind schedule. On appeal from contracting officer's decisions on claims by YDJV and the State Department, the CBCA found that the Government withheld superior knowledge about the Indian Government's intentions and was responsible for the resulting delays, although YDJV caused non-overlapping delays. The case also required the CBCA to, among other things, reach a "jury verdict" for damage to reinforced windows and doors that were defaced with graffiti by subcontractor employees but remained in use at the complex. The CBCA awarded the State Department approximately \$7.1 million in liquidated and other damages (including \$100,000 for the graffiti) and awarded Yates \$547,000.

## STATISTICS

The chart below details the total cases filed and resolved by fiscal year since the CBCA's creation in 2007.



\* 2017 includes separate ADR cases where there is an underlying docketed appeal.

The chart below shows all electronic filings received by the CBCA during fiscal year 2017. The Board provided electronic filing as an option for parties in 2013, and the percentage of parties choosing to file their documents electronically has increased dramatically. In this fiscal year, approximately 89% of all filings were submitted electronically.

ELECTRONIC FILINGS																	
	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
Processed	304	306	297	907	287	315	311	913	243	283	240	766	238	268	305	811	3397
Not Processed	24	16	16	56	22	34	23	79	28	26	22	76	10	14	12	36	247
Rejected	12	9	7	28	12	15	15	42	12	7	7	26	12	10	13	35	131
Spam/Trash	18	22	22	62	27	27	29	83	22	48	54	124	39	39	30	108	377
<b>TOTAL</b>	<b>358</b>	<b>353</b>	<b>342</b>	<b>1053</b>	<b>348</b>	<b>391</b>	<b>378</b>	<b>1117</b>	<b>305</b>	<b>364</b>	<b>323</b>	<b>992</b>	<b>299</b>	<b>331</b>	<b>360</b>	<b>990</b>	<b>4152</b>

- Processed: Submissions found to be compliant with the CBCA's rules and that were included in the case record
- Rejected: Submissions found to be non-compliant with the CBCA's rules and that were not included in the case record, such as filings with attachments that were not in PDF format, filings without the intended attachments, and filings in which the party submitted links in lieu of providing the actual documents
- Not Processed: Submissions deemed not proper to include in the case record, such as acknowledgment of receipt emails from one party to the other, duplicate filings, and emails directed to the Clerk's office regarding general questions
- Spam/Trash: Spam emails, advertisements, etc.

## STATISTICS

The chart below shows all new cases docketed by the CBCA during fiscal year 2017 by case type.

CASES DOCKETED																	
	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
ADR	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	1	2
Appeal	22	10	13	45	11	20	17	48	10	18	9	37	5	19	17	41	171
Appeal Recon	0	1	0	1	0	0	0	0	1	0	0	1	0	2	0	2	4
Debt	0	1	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
EAJA Cost	0	0	0	0	0	0	1	1	0	1	2	3	0	0	0	0	4
FCIC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FCIC Recon	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FEMA	0	1	0	1	0	0	1	1	0	0	0	0	0	0	0	0	2
FMCSA	0	1	2	3	1	2	1	4	0	3	1	4	0	0	0	0	11
ISDA	4	11	8	23	6	4	6	16	8	7	3	18	10	4	4	18	75
ISDA Recon	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	1
Petition	1	0	0	1	1	1	0	2	0	1	1	2	1	0	0	1	6
Rate	0	1	0	1	0	0	1	1	0	0	0	0	0	0	0	0	2
RELO	8	4	5	17	3	11	6	20	6	7	2	15	7	3	4	14	66
RELO Recon	0	0	1	1	0	0	1	1	0	0	0	0	0	1	1	2	4
TRAV	3	2	4	9	1	1	2	4	1	2	4	7	0	6	5	11	31
TRAV Recon	0	0	0	0	0	0	0	0	3	0	1	4	0	0	1	1	5
<b>TOTAL</b>	<b>38</b>	<b>32</b>	<b>33</b>	<b>103</b>	<b>24</b>	<b>39</b>	<b>36</b>	<b>99</b>	<b>30</b>	<b>39</b>	<b>23</b>	<b>92</b>	<b>23</b>	<b>36</b>	<b>32</b>	<b>91</b>	<b>385</b>

<b>ADR</b>	Alternative Dispute Resolution case	<b>ISDA</b>	Indian Self Determination Act case
<b>Appeal</b>	Contract Disputes Act appeal of a contracting officer's final decision (COFD)	<b>Petition</b>	Requesting an order for a COFD
<b>Debt</b>	Debt collection case	<b>Rate</b>	GSA transportation case
<b>EAJA Cost</b>	Equal Access to Justice Act case	<b>RELO</b>	Relocation expenses case
<b>FCIC</b>	Federal Crop Insurance Corp. case	<b>Recon</b>	Reconsideration of any type of case
<b>FEMA</b>	Federal Emergency Management Agency case	<b>TRAV</b>	Travel expenses case
<b>FMCSA</b>	Federal Motor Carrier Safety Administration case		

The chart below shows filings and notices related to appeals of CBCA decisions to the United States Court of Appeals for the Federal Circuit.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT																	
FILINGS/NOTICES																	
	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
Docketed	0	1	0	1	1	3	0	4	0	0	0	0	0	0	0	0	5
Certified List	1	0	2	3	0	1	3	4	1	0	0	1	0	0	0	0	8
Opinion	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	1
Mandate	1	0	0	1	0	0	0	0	0	0	0	0	0	1	0	1	2
<b>TOTAL</b>	<b>2</b>	<b>1</b>	<b>2</b>	<b>5</b>	<b>1</b>	<b>4</b>	<b>3</b>	<b>8</b>	<b>1</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>2</b>	<b>16</b>

## STATISTICS

The chart below shows cases in which a separate ADR was docketed in a case in which the parties had already filed an appeal with the CBCA.

MEDIATIONS OF CASES WITH AN UNDERLYING APPEAL																	
	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
Carried Forward	50	49	57		56	54	57		58	56	54		54	54	52		
New Requests	3	12	3	18	3	3	8	14	2	2	6	10	3	2	13	18	60
Closed	4	4	4	12	5	0	7	12	4	4	6	14	3	4	13	20	58
Fully Resolved	4	4	3	11	3	0	5	8	2	3	6	11	3	1	13	17	47
Partially Resolved	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Not Resolved	0	0	1	1	2	0	2	4	2	1	0	3	0	3	0	3	11
Active Remaining	49	57	56		54	57	58		56	54	54		54	52	52		
Net Change	-1	8	-1	6	-2	3	1	2	-2	-2	0	-4	0	-2	0	-2	2